

(2) *Specified individual.* The term *specified individual* means an individual who is a—

- (i) U.S. citizen;
- (ii) Resident alien of the United States for any portion of the taxable year;
- (iii) Nonresident alien for whom an election under section 6013(g) or (h) is in effect; or

(iv) Nonresident alien who is a bona fide resident of Puerto Rico or a section 931 possession (as defined in § 1.931-1(c)(1)).

(3) *Resident alien.* The term *resident alien* has the meaning set forth in section 7701(b) and §§ 301.7701(b)-1 through 301.7701(b)-9 of this chapter.

(4) *Bona fide resident of a U.S. possession.* The term *bona fide resident of a U.S. possession* means an individual who is a “bona fide resident” under section 937(a) and § 1.937-1.

(5) *U.S. possession.* The term *U.S. possession* means American Samoa, Guam, the Northern Mariana Islands, Puerto Rico, or the U.S. Virgin Islands.

(6) *Specified foreign financial asset.* The term *specified foreign financial asset* has the meaning set forth in § 1.6038D-3T.

(7) *Financial account.* The term *financial account* has the meaning set forth in section 1471(d)(2) and the regulations.

(8) *Financial institution.* The term *financial institution* has the meaning set forth in section 1471(d)(5) and the regulations.

(9) *Foreign financial institution.* The term *foreign financial institution* has the meaning set forth in section 1471(d)(4) and the regulations.

(10) *Foreign entity.* The term *foreign entity* has the meaning set forth in section 1473(5) and the regulations.

(11) *Annual return.* The term *annual return* means an annual federal income tax return of a specified individual or an annual federal income tax return or information return of a specified domestic entity filed with the Internal Revenue Service under section 876, 6011, 6012, 6013, 6031, or 6037, and the regulations.

(12) *Specified domestic entity.* [Reserved]

(b) *Effective/applicability dates.* This section applies to taxable years ending

after December 19, 2011. Taxpayers may elect to apply the rules of this section to taxable years ending prior to December 19, 2011.

(c) *Expiration date.* The applicability of this section expires December 12, 2014.

[T.D. 9567, 76 FR 78560, Dec. 19, 2011]

**§ 1.6038D-2T Requirement to report specified foreign financial assets (temporary).**

(a) *Reporting requirement*—(1) *In general.* Except as otherwise provided, a specified person that has any interest in a specified foreign financial asset during the taxable year must attach Form 8938, “Statement of Specified Foreign Financial Assets,” to that specified person’s annual return for the taxable year to report the information required by section 6038D and § 1.6038D-4T if the aggregate value of all such assets exceeds—

- (i) \$50,000 on the last day of the taxable year; or
- (ii) \$75,000 at any time during the taxable year.

(2) *Special rule for married specified individuals filing a joint annual return.* Except as provided in paragraph (a)(1)(4) of this section, married specified individuals that file a joint annual return for the taxable year must attach a single Form 8938 to their joint annual return to report the information required by section 6038D and § 1.6038D-4T if the aggregate value of all of the specified foreign financial assets in which either married specified individual has an interest exceeds—

- (i) \$100,000 on the last day of the taxable year; or
- (ii) \$150,000 at any time during the taxable year.

(3) *Special rule for certain specified individuals living abroad.* Except as provided in paragraph (a)(1)(4) of this section, a specified individual who is a qualified individual under section 911(d)(1) for the taxable year is required to attach a Form 8938 to the specified individual’s annual return and report the information required by section 6038D and § 1.6038D-4T if the aggregate value of the specified foreign financial assets in which the specified individual has an interest exceeds—

(i) \$200,000 on the last day of the taxable year; or

(ii) \$300,000 at any time during the taxable year.

(4) *Special rule for qualified individuals filing a joint annual return.* A qualified individual under section 911(d)(1) and the qualified individual's spouse who file a joint annual return must attach Form 8938 to their joint annual return to report the information required by section 6038D and § 1.6038D-4T if the aggregate value of all of the specified foreign financial assets in which either married individual has an interest exceeds—

(i) \$400,000 on the last day of the taxable year; or

(ii) \$600,000 at any time during the taxable year.

(5) *Assets with no positive value.* A specified foreign financial asset is subject to reporting even if the specified foreign financial asset does not have a positive value. See § 1.6038D-5T(b) for reporting the maximum value of a specified foreign financial asset, including a specified foreign financial asset that does not have a positive value during the taxable year.

(6) *Excepted assets.* The value of any specified foreign financial asset in which a specified individual has an interest and that is excluded from reporting on Form 8938 pursuant to § 1.6038D-7T(a) is included for purposes of determining the aggregate value of specified foreign financial assets. The value of any specified foreign financial asset in which a specified individual has an interest and that is excluded from reporting under § 1.6038D-7T(b) or (c) is excluded for purposes of determining the aggregate value of specified foreign financial assets.

(7) *Form 8938 filed with annual return—*

(i) *General rule.* A specified person, including a specified individual who is a bona fide resident of a U.S. possession, is not required to file Form 8938 with respect to a taxable year if the specified person is not required to file an annual return with the Internal Revenue Service with respect to such taxable year.

(ii) *Consolidated returns.* If a specified domestic entity is a member of an affiliated group of corporations that files a consolidated income tax return, the

Form 8938 of the specified domestic entity must be filed with the affiliated group's annual return.

(8) *Reporting required regardless of tax result.* The Form 8938 required by section 6038D and this section must be furnished by a specified person even if none of the specified foreign financial assets that must be reported affect the specified person's tax liability under the Internal Revenue Code for the taxable year.

(9) *Reporting period.* The reporting period covered by Form 8938 is the specified person's taxable year, except the reporting period for a specified person who is a specified individual for less than an entire taxable year is the portion of the taxable year that the specified person is a specified individual.

(10) *Successor forms.* References to Form 8938 include any successor form.

(b) *Interest in a specified foreign financial asset—*(1) *In general.* A specified person has an interest in a specified foreign financial asset if any income, gains, losses, deductions, credits, gross proceeds, or distributions attributable to the holding or disposition of the specified foreign financial asset are or would be required to be reported, included, or otherwise reflected by the specified person on an annual return. A specified person has an interest in a specified foreign financial asset even if no income, gains, losses, deductions, credits, gross proceeds, or distributions are attributable to the holding or disposition of the specified foreign financial asset for the taxable year.

(2) *Special rule for parent making election under section 1(g)(7).* A parent that makes an election under section 1(g)(7) to include certain unearned income of a child in the parent's gross income has an interest in any specified foreign financial asset held by the child for the purposes of section 6038D and the regulations.

(3) *Entities.* Except as provided in this paragraph, a specified person is not treated as having an interest in any specified foreign financial assets held by a corporation, partnership, trust, or estate solely as a result of the specified person's status as a shareholder, partner, or beneficiary of such entity. A specified person that is treated as the owner of a trust or any portion of a

trust under sections 671 through 679, other than a domestic liquidating trust under §301.7701-4(d) of this chapter created pursuant to a court order issued in a bankruptcy under Chapter 7 (11 U.S.C. 701 *et seq.*) or a confirmed plan under Chapter 11 (11 U.S.C. 1101 *et seq.*) of the Bankruptcy Code, or a domestic widely held fixed investment trust under §1.671-5, is treated as having an interest in any specified foreign financial assets held by the trust or the portion of the trust. See §1.6038D-3T(c) to determine whether an interest in a foreign trust or an interest in a foreign estate is a specified foreign financial asset. See §1.6038D-5T(f) for rules to determine the maximum value of an interest in a foreign trust or estate.

(c) *Special rules for joint interests*—(1) *Aggregate value of assets*—(i) *Specified persons*. Except in the case of a specified person described in paragraph (c)(1)(ii) of this section, each specified person that is a joint owner of a specified foreign financial asset must include the entire value of the specified foreign financial asset (and not the value of the specified person's interest) for purposes of determining whether the aggregate value of the specified person's specified foreign financial assets exceeds the reporting thresholds set forth in §1.6038D-2T(a).

(ii) *Married specified individuals*. Married specified individuals who file a joint annual return must include the value of a specified foreign financial asset that they jointly own or in which they have an interest under paragraph (b)(2) of this section only once in determining whether the aggregate value of all of the specified foreign financial assets in which either married specified individual has an interest exceeds the reporting thresholds set forth in §1.6038D-2T(a). If a married specified individual files a separate annual return and his or her spouse is a specified individual, the married specified individual includes one-half of the value of a specified foreign financial asset that the married specified individual jointly owns with his or her spouse in determining whether the married specified individual has an interest in specified foreign financial assets the aggregate value of which exceeds the reporting thresholds set forth in §1.6038D-2T(a).

(2) *Annual return filed by a married specified individual*—(i) *Joint annual return*. Married specified individuals that file a joint annual return must file a single Form 8938 to fulfill their reporting requirements under section 6038D and §1.6038D-2T(a). The single Form 8938 must report all of the specified foreign financial assets in which either married specified individual has an interest. If the married specified individuals jointly own a specified foreign financial asset or if they have an interest in a specified foreign financial asset under paragraph (b)(2) of this section, the asset must be reported only once on the single Form 8938 filed for the taxable year.

(ii) *Separate annual return*. A married specified individual who files a separate annual return for the taxable year must fulfill the reporting requirements under section 6038D and §1.6038D-2T(a) by filing a separate Form 8938 that reports all of the specified foreign financial assets in which the married specified individual has an interest, including assets jointly owned with the married specified individual's spouse.

(d) *Example*. The following example illustrates the application of paragraph (c) of this section:

*Example*. (1) *Facts*. Two married specified individuals, H and W, jointly own a specified foreign financial asset with a value of \$90,000 at all times during the taxable year. H separately has an interest in a specified foreign financial asset with a value of \$10,000 at all times during the taxable year. W separately has an interest in a specified foreign financial asset with a value of \$1,000 at all times during the taxable year.

(2) *Filing requirement*—(i) *Married specified individuals filing separate annual returns*. If H and W file separate annual returns, the aggregate value of the specified foreign financial assets in which H has an interest at the end of the taxable year is \$55,000, comprising one-half of the value of the jointly owned asset, \$45,000, and the value of H's separately owned specified foreign financial asset, \$10,000. The aggregate value of the specified foreign financial assets in which W has an interest at the end of the taxable year is \$46,000, comprising one-half of the value of the jointly owned asset, \$45,000, and the value of W's separately owned specified foreign financial asset, \$1,000. H must file Form 8938 with his annual return for the taxable year because the aggregate value of the specified foreign financial assets in which H has an interest exceeds the applicable reporting

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threshold (\$50,000) set forth in § 1.6038D-2T(a)(1). H must report the maximum value of the entire jointly owned asset, \$90,000, and the maximum value of the separately owned asset, \$10,000. See § 1.6038D-5T(b) regarding the maximum value of a jointly owned and specified foreign financial asset to be reported by a specified person, including a married specified individual, that is a joint owner of an asset. The aggregate value of the specified foreign financial assets in which W has an interest, \$46,000, does not exceed the applicable reporting threshold set forth in § 1.6038D-2T(a)(1). W is not required to file Form 8938 with her separate annual return.

(ii) *Married specified individuals filing a joint annual return.* If H and W file a joint annual return, they must file a single Form 8938 with their joint annual return for the taxable year because the aggregate value of all of the specified foreign financial assets in which either H and W have an interest (\$90,000 (included only once), \$10,000, and \$1000, or \$101,000) exceeds the applicable reporting threshold (\$100,000) set forth in § 1.6038D-2T(a)(2). The single Form 8938 must report the maximum value of the jointly owned specified foreign financial asset, \$90,000, and the maximum value of the specified foreign financial assets separately owned by H and W, \$10,000 and \$1,000, respectively.

(e) *Effective/applicability dates.* This section applies to taxable years ending after December 19, 2011. Taxpayers may elect to apply the rules of this section to taxable years ending prior to December 19, 2011.

(f) *Expiration date.* The applicability of this section expires December 12, 2014.

[T.D. 9567, 76 FR 78561, Dec. 19, 2011, as amended at 77 FR 9845, Feb. 21, 2012]

### § 1.6038D-3T Specified foreign financial assets (temporary).

(a) *Financial accounts*—(1) *In general.* Except as otherwise provided in this section, a specified foreign financial asset includes any financial account maintained by a foreign financial institution. An asset held in a financial account maintained by a foreign financial institution is not required to be separately reported on Form 8938, “Statement of Specified Foreign Financial Assets.”

(2) *Financial account in a U.S. possession.* A specified foreign financial asset includes a financial account maintained by a financial institution that is

organized under the laws of a U.S. possession.

(3) *Excepted financial accounts*—(i) *Accounts maintained by U.S. payors.* A financial account maintained by a U.S. payor as defined in § 1.6049-5(c)(5)(i) (including assets held in such an account) is not a specified foreign financial asset for purposes of section 6038D and the regulations.

(ii) *Mark-to-market election under section 475.* A financial account is not a specified foreign financial asset if the rules of section 475(a) apply to all of the holdings in the account or an election under section 475(e) or (f) is made with respect to all of the holdings in the account.

(b) *Other specified foreign financial assets*—(1) *In general.* Except as otherwise provided in this section, a specified foreign financial asset includes any of the following assets that are held for investment and not held in an account maintained by a financial institution —

(i) Stock or securities issued by a person other than a United States person;

(ii) A financial instrument or contract that has an issuer or counterparty which is other than a United States person; and

(iii) An interest in a foreign entity.

(2) *Mark-to-market election under section 475.* An asset is not a specified foreign financial asset if the rules of section 475(a) apply to the asset or an election under section 475(e) or (f) is made with respect to the asset.

(3) *Held for investment.* An asset is held for investment for purposes of section 6038D and the regulations if that asset is not used in, or held for use in, the conduct of a trade or business of a specified person.

(4) *Trade-or-business test.* For purposes of section 6038D and the regulations, an asset is used in, or held for use in, the conduct of a trade or business and not held for investment if the asset is—

(i) Held for the principal purpose of promoting the present conduct of a trade or business;

(ii) Acquired and held in the ordinary course of a trade or business, as, for example, in the case of an account or note receivable arising from that trade or business; or